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In the Supreme Court of the United States

October Term, 1953

No. 15

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

LOCAL UNION NO. 1229, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court below (R. 265-270) is reported at 202 F. 2d 186. The findings of fact, conclusions of law, and order of the Board (R. 10-87) are reported at 94 NLRB 1507.

JURISDICTION

The judgment of the court below (R. 270) was entered on November 20, 1952. The petition for a

writ of certiorari, filed on February 17, 1953, was granted on May 4, 1953 (R. 275). The jurisdiction of this Court is invoked under 28 U.S.C. 1254, and under Section 10 (e) and (f) of the National Labor Relations Act, as amended.

QUESTION PRESENTED

Whether the National Labor Relations Board properly found that the distribution by employees of a handbill disparaging the quality of their employer's television programs with the object of inducing the employer to come to terms in contract negotiations was not the kind of activity entitled to the protection of Sections 7 and 8 of the National Labor Relations Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V. Secs. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 43-48.

STATEMENT

Upon charges filed by respondent (hereinafter called the "Union"), the General Counsel for the Board issued a complaint alleging that the Jefferson Standard Broadcasting Company (hereinafter called "the Company") had violated Sections 8 (a) (1), (3), and (5) of the National Labor Relations Act, as amended (R. 43-44). After the usual proceedings under Section 10 of the Act, the Board, on June 26, 1951, issued an order (R. 10) dismiss-

ing that part of the complaint which alleged that the Company had discharged nine employees in violation of Sections 8 (a) (1) and (3) and had unlawfully refused to bargain with the Union in violation of Section 8(a)(5). The pertinent facts upon which the Board's order is predicated may be summarized as follows:

I. The Facts

In December 1948, the Union was the collective bargaining representative of the technicians of the Company, an operator of a radio and television station (R. 46, 47, 73; 95, 134, 177). During that month, the Union and the Company began to negotiate for a collective bargaining contract (R. 14, 47; 94-95, 135). The negotiations continued until July 8, 1949, when the parties reached an impasse regarding the terms of a clause providing for the arbitration of disputes over the discharge of employees (R. 14, 49; 95, 115-116, 136, 217). The following day, July 9, 1949, the Union began to picket the Company's downtown place of business in Charlotte, North Carolina, without, however, calling a strike (R. 14, 50; 96-97, 106). By placards and handbills, the pickets appealed to the public, in the name of the Union, to support the employees' stand in the contract dispute (R. 14-15, 50-51; 97, 127-132, 245-251). These placards and handbills, in substance, called attention to the "labor dispute" between the Company and the Union, stated

that the Company was "unfair" to the employees, complained that the Company had refused to accept an arbitration clause regarding discharges, and appealed for public support in the employees' "fight for fairness at WBTV" (*ibid.*).

On August 24 the Union commenced the distribution of a different type handbill in order to "apply more pressure [on the Company] than [had] been used to date" (R. 15-17, 51-52; 96-97, 125-127, 188-190, 244). Shortly before this, on July 14, 1949, the Company had inaugurated, at a cost of approximately half a million dollars, operation of a television station (R. 51; 143-144, 193). The new handbill attacked the quality of the television programs broadcast by the Company and the equipment used by it. Unlike the preceding leaflets, the new one made no reference to the pending labor dispute, and did not bear the name of the Union, being signed simply "WBTV Technicians". The text of the handbill, which is referred to in the record as the "second-class" handbill, is as follows (R. 15, 51-52; 97, 244):

Is Charlotte a Second-Class City?

You might think so from the kind of Television programs being presented by the Jefferson Standard Broadcasting Co. over WBTV. Have you seen one of their television programs lately? Did you know that all the programs presented over WBTV are on film and may be

from one day to five years old. There are no local programs presented by WBTV. You cannot receive the local baseball games, football games, or other local events because WBTV does not have the proper equipment to make these pickups. Cities like New York, Boston, Philadelphia, Washington receive such programs nightly. Why doesn't the Jefferson Standard Broadcasting Company purchase the needed equipment to bring you the same type of programs enjoyed by other leading American cities? Could it be that they consider Charlotte a second-class community and only entitled to the pictures now being presented to them?

WBTV Technicians

The handbills were distributed widely throughout the business section of Charlotte, not only at the picket line, but elsewhere, in places such as busses, barber shops, and restaurants (R. 15, 53; 148, 150, 151, 157, 171, 189, 194, 197). Some were sent to businessmen by mail (R. 149, 157, 182, 184). In all, 5,000 copies were distributed from August 24 through September 2, 1949 (R. 52-53; 101, 157-158).

The second-class handbill, like all the previous handbills, was drafted and approved by the Union's officers and executive committee (R. 15, 52; 103-104). The distribution of the handbill oc-

casioned widespread comment in the community and caused the Company to apprehend a loss of advertising revenue due to dissatisfaction with its television broadcasts (R. 16, 53; 137-139, 149, 160-161, 172, 179, 180, 181, 182, 187, 192). Television equipment distributors and dealers became "very concerned" about the effect of the handbill on their business and communicated their concern to the Company personally, by mail, and by telephone (R. 16, 53; 137-138, 172, 180, 183, 185, 187, 191, 192).[1]

On September 3, 1949, the Company discharged the nine employees involved in this proceeding (R. 54; 92, 162, 224-225), all of whom, the Board found, either distributed, or were responsible for the distribution of the "second-class" leaflet (R. 18, 52; 98, 101-105, 106, 133). Pointing out in the letters of dismissal that the Company had not objected to, or interfered with, the distribution of any literature prior to the "second-class" handbill because of its belief that the employees were merely "trying to make the public believe that your employer is unfair to you," the Company declared (R. 54; 92, 224-225):

> Now, however, you have turned from trying to persuade the public that we are unfair *to*

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[1] There was, in fact, an unexpected drop in sales of television receiving equipment during the month following distribution of the handbill (R. 60, n. 10; 183, 186, 187, 191), and the Company operated "in the red" during that period (R. 53; 143-144).

you and are trying to persuade the public that we give inferior service *to them.* While we are struggling to expand into and develop a new field, and incidentally losing large sums of money in the process, you are busy trying to turn customers and the public against us in every possible way, even handing out leaflets on the public streets advertising that our operations are "second-class," and endeavoring in various ways to hamper and totally destroy our business. Certainly we are not required by law or common sense to keep you in our employment and pay you a substantial salary while you thus do your best to tear down and bankrupt our business.

As already noted, *supra,* p. 3, the Company and the Union had reached an impasse in the negotiations on July 8, 1949, prior to the commencement of the picketing. On September 6, 1949, three days after the discharge of the employees who had participated in the distribution of the "second-class" handbill, the Union requested the Company to reinstate these employees, submit their cases to arbitration, and "upon settlement of the discharge question" to resume collective bargaining (R. 19-20, 75; 100, 231). The Company rejected the Union's proposals, indicating that it was not willing to resume negotiations on the basis proposed by the Union since the employees were discharged "for just and compelling reason and we

are not willing to have them back in our employment" (R. 20, 75-76; 100, 232).

About six months later, in March 1950, and again in May 1950, the Union repeated its request to resume negotiations (R. 20, 23, 76; 202-203, 209, 210-214, 255). On May 13, 1950, the Company rejected the Union's request on the ground that because of the discharge of the employees who had distributed the "second-class" handbills, the Union no longer represented a majority of the employees in the appropriate unit (R. 23, 77-78; 204, 205, 207, 258).

Thereafter, upon charges filed by the Union, the General Counsel of the Board issued a complaint alleging, *inter alia*, that the Company had violated Section 8 (a) (1) and (3) of the Act by discharging the employees for distributing the "second-class" handbills. (R. 43-44.) The complaint was subsequently amended to include the further allegation that the Company had violated Section 8 (a) (5) of the Act by refusing to bargain collectively with the Union (R. 45).

II. The Board's Conclusions and Order

Upon the foregoing facts, a majority of the Board (four of the five members), overruling the trial examiner, concluded that the Company had not violated Section 8 (a) (1) and (3) of the Act by discharging the nine employees involved in this proceeding for distributing the "second-class" handbill (R. 13-17). The Board found that al-

though the employees' ultimate purpose in distributing the handbill was to wrest concessions from the Company with respect to the terms of their employment, and was therefore lawful, the means utilized by them to achieve this objective were not protected concerted activities within the meaning of the Act. The Board stated (R. 16-17) that the employees' ultimate purpose

> . . . was undisclosed; the employees purported to speak as experts, in the interest of consumers and the public at large. They did not indicate that they sought to secure any benefit for themselves, *as employees*, by casting discredit upon their employer.
>
> In our judgment, these tactics, in the circumstances of this case, were hardly less "indefensible" than acts of physical sabotage. The Board has held, and we reaffirm, that the Act protects employees against employer reprisal when they speak freely "on organizational matters" (to borrow the Trial Examiner's expression), and in one way or another denounce their employer for his conduct of labor relations or affairs germane to the employment relationship. Moreover, employees acting in concert may exhort consumers to refrain from purchasing their employer's product unless and until he alters his labor policy or practices. But this is a different case. Here, the subject matter of the employees' ver-

> bal attack upon the employer was not related to their interests *as employees*. And the gist of their appeal to the public was that the employer ought to be boycotted because he offerred a shoddy product to the consuming public—not because he was "unfair" to the employees who worked on that product. [Footnotes omitted.]

Accordingly, the Board concluded that the activity was beyond the scope of statutory protection and the discharge of the employees who engaged in it was not a violation of the Act. The Board further concluded, contrary to the trial examiner's recommendation, that since the discharges were lawful, the loss of the Union's majority status as a result of such discharges justified the Company's subsequent refusal to bargain (R. 23).[2] The Board therefore dismissed the complaint insofar as it alleged that the Company had violated the Act in dis-

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[2] Member Murdock dissented from the majority's views, agreeing with the trial examiner that the employees' activities were protected by Section 7 of the Act (R. 28-37, 59-62). Like the court below, Mr. Murdock stated that a concerted activity like the one involved here loses its protection only if it is "unlawful" (R. 32). In view of their conclusion that the distribution of the "second-class" handbill was not a form of concerted activity within the meaning and protection of the Act because it did not relate to the employer-employee relationship, the majority did not reach the question whether the handbill constituted actionable defamation and for that reason was outside the statutory protection (R. 17).

charging the nine employees in question and refusing to bargain collectively with the Union.[8]

III. The Court's Decision

The Union petitioned the court below to review and modify the Board's order insofar as it dismissed the allegations of the complaint involving distribution of the second-class handbill (R. 1-7). The court, without disturbing any of the Board's subsidiary findings of fact, concluded that the Board had erred in dismissing these portions of the complaint (R. 265-270). The court held that the Board was powerless to deny the protection of the Act to concerted activities for mutual aid as long as the objectives of the activities and the means utilized to attain those objectives were both "lawful." The court stated (R. 267-268):

> Protection under § 7 of the Act, then, is withdrawn only from those concerted activities which contravene either (a) specific pro-

[8] The Board found that a tenth employee, whom the Company also discharged, upon the mistaken belief that he had participated in the distribution of the "second-class" handbill, did not in fact distribute, and was not responsible for the distribution of, the handbill and, accordingly, that his dismissal by the Company was violative of Section 8 (a) (3) and (1) of the Act (R. 18-19; 102, 104). The Board further found that the Company violated Section 8 (a) (1) by interfering with, restraining and coercing another employee in the exercise of rights guaranteed by the Act (R. 11-13). These findings and that portion of the Board's order relating to them are not involved in the present proceeding.

visions or basic policies of the Act or of related federal statutes, or (b) specific rules of other federal or local law that is not incompatible with the Board's governing statute.

Accordingly, the court concluded that the Board had failed to make "the finding essential to its conclusion" that the distribution of the second-class bill did not fall within the statutory protection; it set aside the Board's order insofar as it dismissed the complaint; and remanded the case to the Board for further proceedings to determine the "lawfulness" or "unlawfulness" of the distribution of the handbills consistent with the court's opinion (R. 269-270).

SPECIFICATION OF ERRORS TO BE URGED

The court below erred:

1. In holding that all concerted activities undertaken in the course of a labor dispute are entitled to the protection of the Act, so long as such activities do not violate any federal or local law, even though the subject matter of such activities is not related to the labor dispute or the employer-employee relationship.

2. In failing to affirm the order of the Board insofar as it dismissed the complaint against the employer.

SUMMARY OF ARGUMENT

A.

Section 7 of the Act, in general terms, guarantees to employees the right to engage in "concerted activities for the purpose of collective bargaining or other mutual aid or protection." Congress deliberately refrained from defining the kinds of concerted activities which fall within the protective ambit of the section. Instead, it vested in the Board the function of determining in each case whether the particular activity is, in the light of competing employer and employee interests, the type of concerted activity which is entitled to statutory protection. In the exercise of this function the Board may properly find that a collective activity, even though undertaken for a proper objective and not in itself unlawful, is on balance, "so indefensible" as to warrant denial of the protection of the Act to employees who participate in it.

In reaching its conclusion that the protection of the Act extends to all concerted activities unless the objective sought or the means pursued are "unlawful," the court below misread the decision of this Court in *United Automobile Workers* v. *Wisconsin Employment Relations Board*, 336 U.S. 245, and overlooked the relevant legislative history of the Act.

In the *United Automobile Workers* case this Court upheld, as against the claim of federal supersedure, the authority of a state to enjoin the

type of concerted activity involved there. Rejecting claims that the Act confers an absolute right to engage in every kind of concerted activity or that the Board had "irrevocably labeled all concerted activities 'protected,'" the Court concluded that otherwise lawful concerted activities may be so unjustified in particular circumstances as to warrant denial of the protection of the Act. The legislative history confirms this view. In amending the Act in 1947 Congress purposefully refrained from enacting specific limitations upon the scope of the phrase "concerted activities for the purpose of * * * mutual aid or protection" contained in Section 7. Instead, it authorized the Board to give content to the phrase and in the exercise of this function to continue to apply the normal tests of justification for concerted activities which the Board and the courts had developed under the original Act. Under the original Act both the Board and the courts had held that concerted activities, however otherwise lawful, might in the circumstances be so unjustified as to forfeit the normal protection which the Act extends to concerted activities. Congress approved and adopted this reading of the Act.

B.

The decision below stands or falls with the premise, in our view erroneous, that only "unlawful" concerted activities are unprotected by the Act. Once it is recognized that the Board may in at

least some circumstances withhold protection from concerted activities which are not unlawful, it becomes clear that the Board's decision in this case must be sustained.

Implementing the purpose of the Labor Relations Act to protect the concerted activities of employees in matters affecting labor relations, the Board has extended the protection to employees who publicize the facts of a labor dispute, disparage their employer for his labor policies, or appeal to the public to boycott the employer's product until he alters his labor practices But the tactic involved here differs decisively from such protected activities. The "second-class" handbill, although prompted by the labor dispute between the employees and the Company, made no reference to any employment grievances or demands, or even to the pendency of the labor dispute. It denounced the employer, not because of his conduct of labor relations or his position in the labor controversy, but because he was allegedly offering to the public an inferior television service. By purporting to speak as experts, advising the consuming public as to the technical quality of the employer's product, the employees entered a field wholly unrelated to the dispute and transmuted the original controversy between the Company and the employees over employment conditions into a dispute between the employer on the one hand and the employees and the consumer public on the other over the qual-

ity of the employer's product. In this setting, the justification for affording the protection of the Act to employees who denounce their employer, *i.e.*, publicizing a labor dispute in order to persuade the public to give its support in the dispute, is lacking.

Here, in a word, the Board was correct in concluding that the employer's discharge of the offending employees was no more than a wholly reasonable and expectable reaction to faithless service. While the employer's legitimate interest in preserving his business is commonly subordinated to his employees' right under the Act to take concerted action against him in a labor dispute, nothing in the Act requires retention on the payroll of employees who spend their off-duty hours in destructive tactics "hardly less 'indefensible' than acts of physical sabotage" (Board decision, R. 16).

This modest and obviously sensible limitation on the scope of protected concerted activities constitutes no impediment to the pursuit of the activities and objectives with which Congress was concerned in the Act. The Board's decision in no way "impairs, dilutes, qualifies or * * * subtracts from any of the rights guaranteed and protected by the federal Act" *Allen-Bradley Local* v. *Wisconsin Employment Relations Board*, 315 U.S. 740, 750. On the contrary, the decision merely recognizes the balance Congress intended to strike when it wrote the amendments of 1947.

ARGUMENT

The Board Properly Found that the Distribution of the "Second-Class" Handbill by the Company's Employees Disparaging the Quality of Their Employer's Television Service Was Not the Kind of Concerted Activity Entitled to the Protection of Sections 7 and 8 of the Act

The basic question in this case is whether all actions by employees which may literally be described as "concerted activities for * * * mutual aid or protection" are entitled to the protection of Sections 7 and 8 of the Act, provided only that they are not "unlawful" actions. The decision below, holding that only "unlawful" activities are unprotected, eliminates any need for the exercise by the Board of informed judgment in weighing the competing interests of employer and employee. It remands to the Board only a narrow and relatively simple inquiry into the legality of the Union activity in question.

Whatever superficial virtue there may be in the simplicity of the Board's role under the decision below, the Act, as construed by this Court and illuminated by its legislative history, permits no such result. It is clear, we believe, that concerted activities may be unprotected though not unlawful. And it is equally clear, when the erroneous test of unlawfulness is discarded, that the Board properly declined in the circumstances of this case to condemn as unfair labor practices the discharges of the employees who had fashioned and distrib-

uted the handbills disparaging their employer's product.

A. Concerted Activities, Though Not "Unlawful," May Nevertheless Exceed the Limits of the Coercive Tactics to Which Congress Afforded the Protection of the Act.

As in the original Act, Section 7 of the amended Act declares in relevant part that "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Similarly re-enacted, Section 8(a) (1) makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 * * *." The Act nowhere particularizes the nature and character of the activities encompassed by the phrase in Section 7 on which the present controversy turns—"other concerted activities for * * * mutual aid or protection." Deliberately refraining from greater specificity, Congress assigned to the Board the function of defining the scope of this phrase. In vesting the Board with this discretion, Congress took cognizance of the principle that a "statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application." *Phelps Dodge Corp.*

v. *National Labor Relations Board,* 313 U.S. 177, 194. Just as Congress could not "in the nature of things * * * catalogue all the devices and stratagems for circumventing the policies of the Act" or define "the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations" (*ibid.*), so it could not and did not undertake to define in detail the scope of "concerted activities for * * * mutual aid or protection." In short, "Congress advisedly left the concept flexible to be defined with particularity by the myriad of cases" coming before the Board. *Federal Trade Commission* v. *Motion Picture Advertising Service Co., Inc.,* 344 U.S. 392, 394; *Phelps Dodge, supra,* at 194; *Republic Aviation Corp.* v. *National Labor Relations Board,* 324 U.S. 793, 798; *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U.S. 111, 130.

In the exercise of the discretion vested in it, the Board held that the means of self-help utilized by the employees in the instant case, the "second-class" handbill, although employed for a legitimate objective, was, whether lawful or not, so indefensible in the circumstances as to fall beyond the protection which the Act extends to concerted activities. Reversing the Board, the court below concluded that all activities which may be described as "concerted" and "for mutual aid or protection" are within the statute unless the means pursued or the objectives sought

are "unlawful." We submit that this conclusion, misreading the decision of this Court in *United Automobile Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. 245, is at war with the Congressional purpose and intent.

1. In the *U. A. W.* case, this Court was faced with the question whether the means of self-help utilized by employees to achieve proper objectives fell outside the protection of Section 7. There, the employees and the union had been enjoined under a state statute from engaging in a series of short, unannounced work stoppages to force the employer to grant economic concessions. Before this Court, the union asserted that the work stoppages were "federally protected concerted activities" and that hence it was beyond the power of the state to regulate them (336 U. S. at 255). The Court rejected this contention. After pointing out that the Board had held that Section 7 does not sanction all concerted activities for mutual aid or protection, and that a particular activity may be "so indefensible" in the circumstances as to forfeit the protection of Section 7, the Court declared (pp. 256-257):

> In view of that statement [of the Board], the facts of the present case do not bring it within the protection of the Act as administered by the Board. * * * we do not find any fixed Board policy to apply the Act to such facts as we have here. The quoted statement

from the Board's two opinions indicates lack of belief that it was creating any such rule.

However, in no event could the Board adopt such a binding practice as to the scope of § 7 in the light of the construction, with which we agree, given to § 7 by the Courts of Appeals, authorized to review Board orders. In similar cases they have denied comparable work stoppages the protection of that section. *C. G. Conn, Ltd.* v. *Labor Board,* 108 F. 2d 390; *Labor Board* v. *Condenser Corp.,* 128 F. 2d 67; *Home Beneficial Life Ins. Co.* v. *Labor Board,* 159 F. 2d 280; and see *Labor Board* v. *Draper Corp.,* 145 F. 2d 199; *Labor Board* v. *Indiana Desk Co.,* 149 F. 2d 987. To hold that the alleged fixed Board interpretation has irrevocably labeled all concerted activities "protected" would be in the teeth of the Board's own language and would deny any effect to the Courts of Appeals' decisions. The latter decisions and our own, *Labor Board* v. *Fansteel Corp.,* 306 U. S. 240; *Southern S. S. Co.* v. *Labor Board,* 316 U.S. 31; *Labor Board* v. *Sands Mfg. Co.,* 306 U. S. 332; *Allen-Bradley Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 740; and see *Hotel & Restaurant Employees' Local* v. *Wisconsin Employment Relations Board,* 315 U. S. 437, clearly interdict any rule by the Board that

every type of concerted activity is beyond the reach of the states' adjudicatory machinery.

The Court concluded that the recurrent work stoppages were in the circumstances not entitled to the protection Section 7 normally extends to concerted activities. That ruling necessarily establishes that the Board may exclude certain forms of concerted activity from the protection of Section 7 without a finding that such activities are unlawful. And this point, we think, marks the fundamental error in the decision below. The Court below read the *U. A. W.* opinion to mean (R. 268, n. 17) that since the state statute prohibited the activities in question, this Court "gave no broader meaning to 'indefensible' than 'unlawful'" and that "the Court was thinking in terms of 'lawful' and 'unlawful' as the underlying criteria for the application of protection under the Act." But this reading overlooks the "substantial issue" formulated and resolved in this Court's opinion—namely, "whether Congress [had] protected the union conduct which the State [had] forbidden, and hence the state legislation must yield." 336 U. S. at 252. If the conduct in question had been protected by Section 7 of the Federal Act, it could not have been enjoined by the state as "unlawful." "It is elementary that what Congress constitutionally has given, the state may not constitutionally take away." *Id.* at 254. And see *Automobile Workers v. O'Brien*, 339 U. S. 454, 459.

In a word, the conduct involved in the *U. A. W.* case could be held unlawful by the State only because it was not within the protection of Section 7 of the National Labor Relations Act. It fell outside Section 7, not on the bootstraps premise that it was unlawful, but because the Section, which does not confer an "absolute right to engage in every kind of strike or other concerted activity" (336 U. S. at 260), could not properly be read to comprehend such "coercive tactics" (*id.* at 264). The Court's reliance on, and expressed agreement with, *C. G. Conn. Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390 (C. A. 7); *National Labor Relations Board* v. *Condenser Corp.*, 128 F. 2d 67 (C. A. 3); and *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 159 F. 2d 280 (C. A. 4), certiorari denied, 332 U. S. 758, confirms this reading of the decision. See 336 U. S. at 257. None of these cases involved "unlawful" concerted activities.[4] The court of appeals in each case, nevertheless, found that the means of self-help pursued by the employ-

[4] In the *Conn* case, the employees concertedly refused to work overtime until their demands were met by management. In the *Condenser* case, they stopped work in the middle of the day to press grievances although the employer promised to discuss these grievances at the end of the day. In the *Home Beneficial* case, the employees, insurance agents, concertedly refused to abide by the employer's rule to report to the company's office each morning before starting work after he had refused their demand for a relaxation of the rule.

ees in support of their economic demands were in the circumstances unjustified and unduly oppressive, and hence unprotected by the Act. The very fact that the Court cited these cases in conjunction with such cases as *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, and *Southern S. S. Co.* v. *National Labor Relations Board*, 316 U. S. 31, both of which did involve illegal conduct, dispels the notion that the Court was thinking in terms of a simple, mechanical distinction between "lawful" (protected) and "unlawful" (unprotected) conduct.[5]

2. The legislative history of the amended Act bolsters the view that Congress empowered the Board to deny protection not only to unlawful but also to otherwise improper concerted activities. As this Court noted in the *U. A. W.* case, 336 U. S. at 260-262, the House, in considering the 1947 amendments to the Wagner Act, originally adopted a provision expressly withdrawing statutory protection from certain enumerated activities.[6] This provision was "inserted," according to the House Conference Report, "by reason of early decisions of the Board to the effect that the language of section 7 protected concerted activities regardless of their nature or objectives." The House Conference Com-

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[5] See Note, 66 Harv. L. Rev. 1321-1322 (1953); and see, generally, Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L. J. 319, 337 (1951).

[6] H. R. 3020, Sec. 12, in *Legislative History of the Labor Management Relations Act*, 1947, pp. 204-207.

mittee, however, persuaded the House to abandon this provision and to accept the present text of Section 7, as proposed by the Senate. The Committee supported its recommendation by pointing out that the provision in the House bill specifically outlawing certan types of concerted activities was unnecessary because "the courts have firmly established the rule that under the existing provisions of section 7 of the National Labor Relations Act, employees are not given any right to engage in unlawful *or other improper conduct,*" and that the Board in "its most recent decisions * * * has been consistently applying the principles established by the courts." The Committee further pointed out that "there was real concern that the inclusion of such a provision might have a limiting effect and make *improper conduct* not specifically mentioned subject to the protection of the act.'" (Italics supplied).

Congress accordingly readopted the broad language of Section 7. By deliberately omitting to enact specific limitations on Section 7, Congress, as is apparent from the legislative history cited above, authorized the Board to continue to determine whether particular types of concerted activities were entitled to the protection of the Act by applying the normal tests of justification which

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[7] H. Rep. No. 510, 80th Cong., 1st Sess., pp. 38-39, in *Legislative History*, pp. 542-544.

the Board and the courts had developed under the Wagner Act.

Under the Wagner Act both the Board and the courts had held that concerted activities inconsistent with the express provisions or basic policy of the Act or of some related federal statute were not within the statutory protection See, *e.g.*, *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U. S. 31; *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332; *American News Co.*, 55 NLRB 1302. But, in addition, the Board and the courts of appeals had also held that the protection of the statute might be denied to conduct which, although not independently unlawful, was in the circumstances so improper, either because of the objective sought or the way in which the objective was pursued, as to be indefensible. Early in its history the Board, as this Court noted in the *U. A. W.* case, declared in *Harnischfeger Corp.*, 9 NLRB 676, at p. 686, and reiterated in *Armour & Co.*, 25 NLRB 989, at p. 996:

> Section 7 of the Act expressly guarantees employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. We do not interpret this to mean that it is unlawful for an employer to discharge an employee for *any* activity sanctioned by a union or otherwise in the nature of collective activity. The question before us is, we think, whether this particular

> activity was so indefensible, under the circumstances, as to warrant [the employer], under the Act, in discharging the [employees] for this type of union activity.

Applying this test, the Board denied the statutory protection to an employee who joined in a strike without having first afforded the employer an opportunity to obtain a replacement to perform his duties, which were essential to the physical safety of the plant;[8] to employees who participated in a slowdown in a plant working on a high priority war contract;[9] and to employees whose organizational activities on plant premises tended to incite insubordination or flouting of discipline, or to cause interference with production.[10]

Similarly, the courts of appeals under the Wagner Act had held that particular work stoppages or other concerted activities which were undertaken in connection with labor disputes and were not in themselves unlawful were nevertheless on balance so indefensible in the circumstances as to fall outside the statutory protection. Thus, for example, in *C. G. Conn, Ltd.* v. *National Labor Relations Board*, 108 F. 2d 390, 396-398 (C. A. 7), it

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[8] *Republic Creosoting Co.*, 19 NLRB 267, 290.

[9] *Underwood Machinery Co.*, 74 NLRB 641, 646-647.

[10] *Wilson & Co., Inc.*, 43 NLRB 804, 820; *Thompson Products, Inc.*, 57 NLRB 925, 970, n. 44; *Goodyear Aircraft Corp.*, 57 NLRB 502, 508.

was held that the concerted refusal of employees to work overtime because of a dispute concerning overtime pay was such a flagrant invasion of the employer's right to regulate working time, in the absence of agreement on this subject with the employees, as to fall outside the scope of protected concerted activities. In *Home Beneficial Life Ins. Co.* v. *National Labor Relations Board*, 159 F. 2d 280, 285-286 (C. A. 4), certiorari denied, 332 U. S. 758, the court held unprotected the employees' concerted refusal to report to their employer's office each morning before undertaking to service their customers, after the employer had refused their demand that the reporting requirement be dropped. In *National Labor Relations Board* v. *Montgomery Ward & Co.* 157 F. 2d 486, 496 (C. A. 8), it was held that employees who concertedly refused, while at work, to process the orders of a struck plant were not engaged in concerted activities protected by the Act. In *National Labor Relations Board* v. *Condenser Corporation*, 128 F. 2d 67, 77 (C. A. 3), employees engaged in a work stoppage during the middle of the working day and refused to continue working until their demands for higher pay were met, although the employer had agreed to take up the matter at the end of the day. The court, holding that the employer was justified in discharging the participants in the work stoppage, declared, "We do not think that under the circumstances the statute prevents

their discharge.'"[11] In none of these cases could it be said that the employees had engaged in "unlawful" concerted activity. The decision in each case turned on the consideration that the employees' concerted activities, viewed in the light of all the circumstances, including the nature of their acts and their impact on the employer's legitimate interest in preserving or maintaining his business operations, were unjustifiable and therefore unprotected.

Congress, aware of the current of decisions by the courts and the Board, left intact the rule that concerted activities might be "indefensible" and therefore unprotected, though not "unlawful," when it amended the Act. As we have noted, Congress purposefully refrained from defining the scope of the term "concerted activities" because of its concern that any specific definition might fail adequately to exclude, in addition to "unlawful" conduct, "other improper conduct" which should not be entitled to the protection of the Act. Congress was satisfied that the Board and the courts were excluding from the protection of the Act both "unlawful" and "other improper conduct". As this Court has pointed out, "the record indicates that, had the courts not made these interpretations, the Congress would have gone as far

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[11] As noted above, this Court in the *U. A. W.* case (336 U.S. at 257) cited with express approval the *Conn*, *Home Beneficial*, and *Condenser* cases.

or farther in the direction of limiting the right to engage in concerted activities." *United Automobile Workers* v. *Wisconsin Employment Relations Board*, 336 U. S. at 260. In short, the holding of the court below that Congress withheld the protection of the Act only from such concerted activities as were "unlawful" is refuted by the legislative history of the Act.

3. The Board and the courts, since the 1947 amendments to the Act, have continued to apply the limitations on protected concerted activities developed under the Wagner Act and approved by Congress. Thus, in *Elk Lumber Co.*, 91 NLRB 333, the Board, finding that a concerted slowdown to induce the employer to grant economic demands was unprotected, stated (pp. 336-337):

> Section 7 of the Act guarantees to employees the right to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. However, both the Board and the courts have recognized that not every form of activity that falls within the letter of this provision is protected. The test, as laid down by the Board in the *Harnischfeger Corporation* case [9 NLRB 676], and referred to with apparent approval by the Supreme Court in the recent *Wisconsin* case [*U. A. W.* v. *W. E. R. B.*, 336 U. S. 245], is whether the particular activity involved is so indefensible as to warrant the employer in discharging the

> participating employees. Either an unlawful objective or the adoption of improper means of achieving it may deprive employees engaged in concerted activities of the protoection of the Act. [Footnotes omitted.]

In *Carnegie-Illinois Steel Corporation,* 84 NLRB 851, supervisory employees[12] concertedly refused, during a strike of rank and file employees, to report to work to perform certain assignments essential to prevent serious damage to plant equipment. The Board held that the supervisors' failure to report for work was, in the circumstances, such a serious breach of their duty to their employer as to remove them from the protection of the Act, even though it could not be said that their conduct was "unlawful." It stated (at pp. 853-854):

> * * * [T]he reinstatement rights of employees discharged for concerted activities cannot be considered in a vacuum, but must be determined in the context of their legal duties and responsibilities.
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> * * * * * * * *
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> So, in the instant case, in view of the peculiar susceptibility of the Respondent's plant to crippling damage from an abrupt shut-down

[12] The alleged unfair labor practice in that case occurred under the Wagner Act, which covered supervisory employees; the Board decision, however, was handed down after the amended Act was passed.

> of its operations, the Respondent was entitled to have in supervisory positions persons on whom it could depend for emergency duty to forestall destruction of key plant facilities, and it was not unlawful for it to discharge those of its supervisors who, by walking out or failing to report during the rank-and-file strike, demonstrated their lack of dependability in an emergency.

Upholding the Board's decision, the Court of Appeals for the Seventh Circuit stated (*Albrecht* v. *National Labor Relations Board,* 181 F. 2d 652, 659):

> Bearing in mind the function of the Board initially to settle conflicts in the administration of the relationship between employer and employee, we find nothing in the finding and conclusions which violates the act or goes beyond the limitations of the authority granted by Congress to the Board.

Accord: *United States Steel Co.* v. *National Labor Relations Board,* 196 F. 2d 459 (C. A. 7) (concerted refusal of plant protection employees to report for work "in time of great emergency"); *Maryland Drydock Co.* v. *National Labor Relations Board,* 183 F. 2d 538 (C. A. 4) (circulation of union literature on employer's premises "insulting to those in charge of management and destructive of discipline").

The thread that runs through the decisions, both before and after the 1947 amendments to the Act, is that rights guaranteed by the Act, like so many others, "are not unlimited in the sense that they can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee. Opportunity to organize and proper discipline are both essential elements in a balanced society." *Republic Aviation Corporation* v. *National Labor Relations Board*, 324 U. S. 793, 798. To achieve the "balance of forces" which Congress thought it "necessary to create" (*National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 128) Congress entrusted to the Board "the function * * * to weigh the conflicts which arise from time to time out of the exercise of those rights and to determine in each case whether the interest of the employees or the interest of the employers should be held paramount" (*National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 816 (C. A. 7)). The Act, as Congress has declared, seeks to bring about an accommodation between "the legitimate rights" of employers and employees "in their relation with each other" (Section 1 (b) Labor-Management Relations Act, 1947, *infra*, p 43). In working out adjustments between these competing interests, it is the task of the Board "to determine what in fact would be the prejudice to the interests of the employer * * *, and what would be the benefit to the

employees, and whether the benefit prevailed over the prejudice, or the prejudice prevailed over the benefit" (*National Labor Relations Board* v. *Lake Superior Lumber Corp.*, 167 F. 2d 147, 152 (C. A. 6)). Weighing these competing rights and interests the Board, implementing the purpose of Congress as construed by this and other courts, may properly conclude in particular circumstances that concerted activities, though not "unlawful," are outside the purview of Sections 7 and 8.

B. The Board's Finding That the Distribution of the "Second-Class" Handbill Was Unprotected Represents a Reasonable And Valid Adjustment of the Competing Interests of the Employer and Employees

The decision below, resting on the proposition that the Board may withhold protection from concerted activities only when they are unlawful, must be rejected if, as we think has been demonstrated, this proposition is fallacious. It becomes clear that the problem in each case "is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially," and that "the Board's determination * * * is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *National Labor Relations Board* v. *Hearst Publications, Inc.*, 322 U. S. 111, 131. We submit that, under any standard of review, the Board's finding that the distribution of the "second-class" handbill was unprotected represents a reasonable and

valid "adjustment between the undisputed right of self-organization assured to employees * * * and the equally undisputed right of employers" to protect their business. *Republic Aviation Corp.* v. *National Labor Relations Board*, 324 U. S. 793, 797-798.

The protection which the Act extends to concerted activities embraces, of course, the exercise by employees of full freedom of speech on all matters affecting organization and collective bargaining. See *Thomas* v. *Collins*, 323 U. S. 516, 533-534. Included within this guarantee is the traditional practice of employees involved in a labor dispute of publicizing the issues arising out of the employer-employee relation in an effort to persuade the public of the correctness of their position and thereby enlist its support. Giving effect to this right, the Board and the courts have marked out a wide area of protected concerted activities, including the right of employees to denounce their employer for his conduct of labor relations or other matters bearing upon the employment relationship. The Board has also held privileged the traditional type of concerted activity in which employees, seeking to enlist public support for their demands, exhort the public to boycott their employer until he alters his labor policies or practices.[13] In such

[13] *E. g., National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 815-816 (C. A. 7); *Cusano* v. *National Labor Relations Board*, 190 F. 2d 898, 902-903 (C. A. 3), en-

cases, where the employees' attack upon the employer is related to the employment relationship and the employees' interests as employees, the Board has, as the statute requires, subordinated the employer's legitimate interest in protecting his business against disparagement. The balance thus struck reflects the fact that the Act is a labor relations statute, concerned with the adjustment through collective bargaining of disputes arising out of differences as to wages, hours, or working conditions, and that within this area employees are entitled to protection in publicizing matters of legitimate concern to them.[14]

The facts here, as the Board pointed out (R. 17), make this "a different case." The "second-class" handbill, although prompted by the labor dispute

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forcing 92 NLRB 1272, 1274-1275; *Electronics Equipment Co.*, 94 NLRB 62, 64-66, remanded and subsequently reversed on other grounds, 194 F. 2d 650, 205 F. 2d 296 (C. A. 2); *Westinghouse Electric Corp.*, 77 NLRB 1058, 1060-1061, reversed on other grounds, 179 F. 2d 507 (C. A. 6).

[14] *Cf.* the Norris-La Guardia Act, which has been said to comprehend "the conventional tactics of organized labor" (Frankfurter and Greene, *The Labor Injunction*, p. 220). Section 4 (e) of that statute gives protection to "Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence." The "second-class" handbill would scarcely qualify as a method of "giving publicity to the existence of, or the facts involved in, any labor dispute." Section 7 of the National Labor Relations Act was also designed to comprehend the conventional tactics of organized labor. *Cf. Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, 346.

between the employees and the Company, made no reference to any employment grievances or demands, nor even to the pendency of a labor dispute. It was distributed far from the situs of the labor dispute. Batches of handbills were distributed to the public in buses, restaurants and barber shops, and others were sent in the mail. The handbill did not purport to enlist public support for the employees in a dispute with their employer over terms and conditions of employment. It denounced the Company, not for the conduct of labor relations or its position in a labor controversy, but because it was offering to the public an inferior service. It bore simply the signature "WBT Technicians." In it the employees spoke not as employees voicing grievances relating to their interests as employees, but as experts advising the consumer public as to the technical quality of the Company's product. And, as the Board pointed out (R. 17), "the gist of their appeal to the public was that the employer ought to be boycotted because he offered a shoddy product to the consuming public—not because he was 'unfair' to the employees who worked on that product." Hence, the handbill, although prompted by the labor dispute, did not constitute a means for "the dissemination of information concerning the facts of a labor dispute * * *." *Thornhill* v. *Alabama*, 310 U. S. 88, 102. It entered a field wholly unrelated to the dispute and transmuted the controversy between the Company and the employees

over the employment relationship into a dispute between the employer on the one hand and the employees and consumer public on the other over the technical quality of the Company's television service. In a word, the normal justification for affording the protection of the Act to employees who disparage their employer, *i.e.*, publicizing a labor dispute in order to persuade the public to enlist its support in the dispute, was lacking. *Cf. Restatement of Torts*, § 799.[15] In circumstances like these,

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[15] The Union, in support of its position that the handbill was a protected form of concerted activity, relied on the opinion of Judge Learned Hand in *National Labor Relations Board v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F. 2d 503 (C. A. 2). There, the company sought to defend a charge that it had discriminatorily discharged an employee in violation of the Act on the ground that he had participated in the publication of a union resolution which protested the company's support of one of two rival milk suppliers. The Board found that the reason advanced by the employer was a pretext to cover up the real reason for the dismissal, namely, the employee's role in promoting the unionization of fellow employees. The court, without deciding whether this finding was supported by the record, concluded that the "excuse" relied on by the employer was itself invalid because the publication was a form of concerted activity for mutual aid and protection within the meaning of the Act. That case, we think, is distinguishable from the instant case. Unlike the "second-class" handbill, the resolution was signed in the name of the employees' labor organization and, as published, was in the form of a resolution passed at a meeting of the union. And, unlike the handbill, the resolution did not suggest that the public boycott the employer because he was offering the public an inferior product. Thus, the resolution was not dissimilar from the conventional appeal of a union for public support in a dispute with the employer.

an employer would seem plainly to have the right to discharge employees who seek to prevent him from selling his product, when they are paid to do just the opposite.

Moreover, the "second-class" handbill, unlike the traditional appeal for public support in a labor dispute, was not calculated simply to enlist public support for the duration of the dispute between the Company and the employees. In attacking the technical quality of the Company's television service, the handbill would normally tend to have an effect which settlement of the dispute would not dissipate. This factor is underscored by the letter of dismissal which the Company sent to the employees. The Company stated in part (*supra*, pp. 6-7):

> * * * [W]hen we were unable to agree upon the terms of a contract with your Union, you began to denounce us publicly as unfair.
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> * * * * * * * *
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> Now, however, you have turned from trying to persuade the public that we are unfair to *you* and are trying to persuade the public that we give inferior service *to them*. While we are struggling to expand into and develop a new field * * * you are busy * * * endeavoring in various ways to hamper and totally destroy our business.

Of course, the measure of protection accorded to concerted activities does not turn simply upon the degree of injury the employer may suffer or the effectiveness of the activities. But this Court's decision in the *U. A. W.* case makes it clear that disproportionate damage to the employer—particularly where the employees involved stay on the payroll while they inflict the damage—may justify discharges as a valid refusal to pay for faithless service rather than an unlawful interference with protected concerted activities. Such a result was peculiarly appropriate here, where the employer continued to employ the employees involved while they picketed its place of business in their off-duty hours, and discharged them only when they resorted to tactics properly described by the Board (R. 16) as being "hardly less 'indefensible' than acts of physical sabotage."[16]

It should be noted, finally, that the limitation placed by the Board in this case upon the scope of

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[16] *Cf. National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345, where the Court recognized the employer's right to replace economic strikers even though it tends to minimize the effectiveness of strike action. The decision likewise represents an adjustment between the employees' interest in concerted activity and the employer's interest in continuing operations. Similar considerations have prompted the Board to qualify the employees' right to strike and hold that an employer may, without committing an unfair labor practice, for compelling economic reasons shut down his plant in anticipation of an impending strike. *Duluth Bottling Association*, 48 NLRB 1335; *Betts Cadillac Olds, Inc.*, 96 NLRB 268.

protected concerted activities does not deprive employees of means "shown to be * * * essential or intimately related to a realization of the guarantees of the federal Act * * *." *Allen-Bradley Local v. Wisconsin Employment Relations Board*, 315 U. S. 740, 750. The employees are still free to strike, to picket, and to utilize other appropriate means for disseminating the facts of a labor dispute and enlisting public support. The Board's ruling, in short, neither "impairs, dilutes, qualifies [nor] in any respect subtracts from any of the rights guaranteed and protected by the federal Act." *Ibid.*

CONCLUSION

For the reasons stated, it is respectfully submitted that the decision of the court below should be reversed and the case remanded with directions to affirm the order of the Board and deny the petition to review.

ROBERT L. STERN,
Acting Solicitor General.

MARVIN E. FRANKEL,
Special Assistant to the Attorney General.

GEORGE J. BOTT,
General Counsel,

DAVID P. FINDLING,
Associate General Counsel,

DOMINICK L. MANOLI,
Assistant General Counsel,

SAMUEL M. SINGER,
Attorney,

National Labor Relations Board.

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APPENDIX

Section 1 of the Labor Management Relations Act, 1947 (61 Stat. 136, 29 U. S. C., Supp. V. 141, *et seq.*), provides in pertinent part as follows:

Short Title and Declaration of Policy

Section 1. * * *

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of

labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

* * *

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. V, 151, *et seq*), are as follows:

RIGHTS OF EMPLOYEES

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

Sec. 8 (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

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PREVENTION OF UNFAIR LABOR PRACTICES

Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

* * * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of

employees with or without back pay, as will effectuate the policies of this Act * * *

* * * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit * * * wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused

because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * * The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was en-

tered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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